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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ERIC LINELL SHELMIRE, Defendant and Appellant.	C045429 (Super. Ct. No. 01F07610)

APPEAL from a judgment of the Superior Court of Sacramento County, Timothy M. Frawley, J. Affirmed.

Michael Satris, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson and Mary Jo Graves, Assistant Attorneys General, Stan Cross, Charles A. French and Jennifer M. Poe, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II through VII of the DISCUSSION.

In *People v. Sedeno* (1974) 10 Cal.3d 703 (*Sedeno*), our Supreme Court said, "[T]he duty to give instructions . . . on particular defenses and their relevance to the charged offense arises only if it appears that a defendant is relying on such a defense, *or* if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*Id*. at p. 716, italics added.)

The first prong of this disjunctive test suggests that a defendant is entitled to an instruction on a defense on which defendant is "relying" even if no substantial evidence supports the instruction. In this case, we conclude that more recent Supreme Court authority has overruled the first prong of the *Sedeno* test. Put differently, we conclude that a defendant is entitled to an instruction on a defense only where substantial evidence supports the defense.

In a joint trial with three separate juries, defendant Eric Linell Shelmire was tried along with codefendants Andre Craver and Gerald Jones, Jr., for first degree murder (Pen. Code, § 187, subd. (a); undesignated section references are to the Penal Code), with the special circumstance allegations of murder in the commission of an attempted robbery and in the course of a burglary (§ 190.2, subd. (a)(17)), and the additional allegation

of being armed with a firearm (§ 12022, subd. (a)(1)).[1] Defendant's jury convicted him of first degree murder and found the firearm allegation true, but rejected the special circumstance allegations.

Defendant contends: (1) The trial court erred reversibly by failing to instruct the jury sua sponte on defendant's burden of proof as to his only theory of defense, withdrawal. (2) The trial court's instructions on the definition of withdrawal were prejudicially erroneous. (3) The trial court abused its discretion by granting the prosecution's request for separate juries over defense objection. (4) The trial court erred by denying defendant's motion for mistrial. (5) The trial court abused its discretion by denying the jury's request for a readback of defense counsel's closing argument. (6) The trial court erred by denying defendant's motion for new trial. (7) Cumulative prejudice requires reversal.

We shall affirm.

FACTS

The crimes

In September 2001, the murder victim, Justin Roberts, lived in an apartment in Carmichael along with his girlfriend, Sally Lewis, their two small children, Lewis's brother Levi, and

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[1] Craver and Jones were convicted of first degree murder and the firearm enhancement was found true as to both. As to Craver, the jury also found the burglary special circumstance true. They are not parties to this appeal.

Roberts's friend Eric Aguiar.[2] Roberts and his family shared the master bedroom, Levi occupied the other bedroom, and Aguiar slept on the couch in the living room.

Roberts legally grew marijuana on his patio for medicinal purposes, and Lewis was his licensed caregiver. Roberts also sold marijuana to friends, however. Aguiar had a felony conviction for transporting marijuana.

Two or three weeks before the homicide, Gilbert Espinoza, Jr., went to Roberts's home to buy marijuana. According to Aguiar, Espinoza said his friend "Munchie" (codefendant Craver) wanted to make a purchase. Espinoza assured Aguiar that Craver was "cool."[3] Aguiar agreed to sell Craver a quarter-pound of marijuana for $1,100 as a favor to Espinoza.

Aguiar later met Craver and exchanged the marijuana for cash, but Roberts discovered on inspection that the cash was counterfeit; Aguiar paid him to cover the loss. Aguiar conveyed his anger and his desire to recover the money to Espinoza, but Aguiar and Espinoza denied looking for Craver or putting out word on the street about him.

At around 4:00 a.m. on September 14, Aguiar, sleeping on the living room couch in the dark apartment, was suddenly

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[2] All dates mentioned are in 2001.

[3] Espinoza testified he did not tell Craver that Roberts had marijuana at the apartment. He denied giving Craver the code to the apartment complex gate, which Roberts had given him.

awakened by the sound of the window blinds crashing, followed by someone jumping through the open window and landing on top of him. He could see only that the intruder was Black. The intruder hit him in the head with something metallic. Aguiar shoved his right index finger into the intruder's eye socket, causing him to scream twice, "I need help."

Lewis and Roberts, also now awake, ran to the living room, with Roberts ahead. Roberts flipped the light switch, temporarily blinding Lewis.

Three gunshots rang out. Aguiar saw the flashes and heard the shots near his head. He did not know whether his antagonist or a second intruder had fired the shots. Aguiar's antagonist then jumped out the window.

Lewis found Aguiar bleeding in the living room. Then she found Roberts lying in a pool of blood on the bathroom floor, dying of a gunshot wound to the chest.

Steven Palenko, who lived in an apartment in the next building, was woken by the gunshots. He tried to call 911, but misdialed in the dark. Hearing a woman scream that her husband had been shot and looking out the window, Palenko saw three dark-skinned men running away. He observed the clothing worn by the one later identified as defendant. He saw the men jump over a fence, reach the gate of the next apartment complex, crouch behind the fence until a car drove past, then open the gate; two ran to the left and the other to the right. Palenko then succeeded in calling 911.

Sacramento County Deputy Sheriff John Sydow, dispatched to the scene, heard on the radio that suspects had been seen fleeing. He saw a Black male, later identified as defendant, running through a gas station. When Sydow stopped defendant, defendant gave a false last name. Sydow detained him, then brought him to a field identification showup, where Palenko identified him as one of the three men he had seen. Palenko also identified codefendant Craver in a later photo lineup as another of the men.

At the crime scene, officers found a .45-caliber shell casing on the floor, another shell casing on the couch, a shell casing on the side of the couch, and a bullet hole in the kitchen cabinet; Detective Grant Stomsvik determined that the gun had probably been fired close to the couch along the west wall. The officers also discovered evidence of a marijuana sales operation in the apartment.

DNA evidence showed that blood on the window blind and couch was Aguiar's and that material in fingernail scrapings taken from Aguiar's right index finger had come from Craver. Fingerprints on the living room window blinds were determined not to be defendant's.

Defendant's statements

September 14

Interviewed by Detective Will Bayles, defendant first claimed he had been at a party in the neighborhood and had then been out looking for a pay phone to call his brother-in-law for

a ride. His girlfriend, Kimberly Domondon, came to the police station and talked to him while the officers surreptitiously recorded the conversation; he told her the same story.

Bayles eventually confronted defendant and told him to tell the truth. Defendant denied doing anything wrong or knowing anything about what had happened inside the apartment.

Ultimately, defendant said Craver had knocked on his door around 2:30 a.m. and asked him to come along to get money and marijuana from Craver's brother; Craver promised to repay a loan from defendant. Craver drove them to the North Highlands area, where he talked to a man defendant did not know. Craver and the other man, driving separate vehicles, parked in front of an apartment complex; the other two walked in, Craver saying he would be back in five or 10 minutes. After a while, defendant got out of Craver's car and went to look for the others. Unable to open the gate to the complex, defendant jumped a fence. As he walked toward the rear of the complex, he heard gunshots and screams. Defendant ran off and went through a creek; he did not know if the others had come the same way.

Defendant frequently expressed fear of Craver, asking if he would come into contact with him in jail and worrying about whether Craver would be able to see the written report of this interview.

September 15

Interviewed by Detectives Bayles and Stomsvik, defendant admitted he had made up his original story. During a

conversation with defendant's brother and sister-in-law that the officers surreptitiously monitored, defendant told them the story he had finally told Detective Bayles the day before, adding that Craver had set him up and had fired the shots.

Defendant then told the detectives that 90 percent of what he had said the day before was the truth. He now said that after the three men arrived at the apartment complex, the other two whispered to each other, then fell silent when he got out of the car and walked up to them. He got back into Craver's car. Craver came over and said he would be right back. Defendant saw the other two walk through the gate, indicating that Craver knew the code. Defendant waited five or 10 minutes, then hopped over the gate and headed toward an open window, assuming the others had gone in there. Because the blinds were closed, he could not see into the apartment. He heard tussling, someone who sounded like Craver saying "motherfucker," and two or three gunshots. He ran away alone, going too fast for the others to catch up. He had not known a robbery was planned, he had not seen that anyone had a gun, and he had believed they were going to Craver's brother's place.

September 19

In a recorded statement that the jury heard in part, defendant repeated the story he had told on September 15.

September 20

In a recorded statement that the jury also heard in part, defendant told a somewhat different story.

Contrary to his previous story, he had not loaned Craver money. Craver unexpectedly showed up at defendant's home around 6:00 p.m. on September 14, carrying a duffel bag that contained nunchakus, small knives, photo albums of Craver's family, and a purported "death manual" about ways to hurt people. Defendant did not know why Craver was showing him these items. Hoping Craver would leave, defendant said he was going out.

Craver then talked about the residence of a couple of marijuana dealers whom he had burned with fake money. He thought it would be easy to burglarize the place, netting a couple of thousand dollars and a couple of pounds of marijuana. He told defendant where the money and marijuana would probably be and said the two of them would just "grab the shit and get out." Defendant verbally consented.

Defendant heard a knock at the door around 2:00 or 3:00 a.m., but did not answer immediately, hoping Craver would go away. When he eventually answered the door, Craver surprised him by saying they would get a third person because there were a lot of people in the target apartment.

At the apartment complex, all three men walked up to the gate; Craver opened it, using the code, and pointed out the target apartment. He kept his hands hidden in the front pocket of his hooded sweatshirt. The other man carried a duffel bag.

Walking toward the apartment, defendant saw a window cracked open. He got scared and did not go near the window. Craver slid it open with gloved hands and entered, followed by

the third man. Defendant thought the others knew he was scared, but did not tell the detectives that the others verbally challenged him or urged him on. He was not acting as a lookout.

Staying 20 feet from the window, defendant heard struggling, the word "motherfucker" from Craver, and gunshots; Craver immediately fled through the window and landed on the ground. Defendant asked him, "What the fuck you do?" and wanted to know if he had hit someone; Craver said he did not know. "[T]ripping the fuck out," defendant yelled Craver's nickname until Craver told him to shut up. They ran together and jumped a fence, then split up.

Defendant said he did not consider wearing a disguise or mask when they went to the apartment because he knew he was going to back out. He told the detectives he "stayed back to let them get everything under control," but then denied that that was the plan: "We really didn't talk about it. We just went in there without a plan or nothing."

Defendant wondered whether Craver had gone there intending to kill someone. Craver had told him there was a $5,000 hit out on him for burning Roberts on the marijuana purchase, but defendant had not believed it. Defendant would not have gone to the apartment if Craver had told him he planned to kill anyone.

Kimberly Domondon's statement

The detectives interviewed Domondon, who had been defendant's girlfriend for a month or two, on September 14 after defendant's arrest, and on several additional dates. At trial,

she claimed she could not remember what she had said; she admitted that Craver had threatened her. However, according to one of the detectives, she told them the following:

Craver was at her home on September 14, wondering where defendant was; she told him she had thought defendant was with him. Craver concluded defendant must have gotten caught after taking a wrong turn. About a week later, Craver said he felt like killing defendant because "people don't know how to keep their mouths shut"; then he left, saying, "I think I have scared you enough." Craver also told her she should forget about defendant because he was "going to go down for this," while Craver had an ironclad alibi and had disposed of the gun.

Other evidence

Searching Craver's residence, the detectives found torn pieces of paper on which were written the codes to the apartment complex gate and the number of Roberts's apartment.

Defendant's case

Defendant did not testify or put on any evidence.

Closing arguments

Defense counsel argued that defendant had withdrawn from participation in the crimes by failing to accompany the other defendants into the apartment, and he could not reasonably have been expected to do more to prevent the crimes because he was extremely afraid of Craver. The prosecutor replied that defendant had not done the minimum needed to show withdrawal because he had neither told the other defendants he was

withdrawing nor taken any steps to prevent the crimes, and his alleged fear of Craver did not legally excuse him from doing these things.

DISCUSSION

I

Defendant contends the trial court erred prejudicially by failing to perform its duty to instruct the jury sua sponte as to defendant's burden of proof on his withdrawal defense. The People contend defendant was not entitled to an instruction on the withdrawal defense, so any error as to defendant's burden of proof on that defense is necessarily harmless. For reasons we shall explain, we agree with the People.

Background

The trial court instructed the jury on the defense of withdrawal with CALJIC No. 3.03 as follows: "Before the commission of the crimes charged an aider and abett[o]r may withdraw from participation in those crimes and thus avoid responsibility of [*sic*] those crimes by doing two things: First, he must notify the other principals known to him of his intention to withdraw from the commission of those crimes. Second, he must do everything in his power to prevent its [*sic*] commission." However, the court did not instruct the jury on defendant's burden of proof as to that defense.

On August 18, 2003, juries hearing the cases of co-defendants Craver and Jones convicted them. However, defendant's jury continued deliberations as to him. During

these deliberations, the jury asked for a readback of defense counsel's arguments about "communication of intention to withdraw." The jury also asked the trial court to clarify the legal meaning of the word "notify" and the phrase "everything in his power" as used in CALJIC No. 3.03. In addition, the jury requested the videotape and transcript of defendant's final interview with Detective Bayles.

The trial court provided the videotape and transcript, but denied the request for a readback of counsel's argument, saying: "A jury is not allowed to hear read-back [*sic*] of arguments by the attorneys on either side because attorneys' arguments are not evidence."[4] As to CALJIC No. 3.03, the trial court gave a clarifying instruction.[5] However, the court still did not instruct on defendant's burden of proof as to withdrawal.

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[4] If the trial court meant that it was legally barred from providing a readback of counsel's argument, the court erred. Although not required to do so, the trial court has discretion under section 1138 to provide a readback of counsel's arguments. (*People v. Sims* (1993) 5 Cal.4th 405, 453; see *People v. Gurule* (2002) 28 Cal.4th 557, 649; *People v. Pride* (1992) 3 Cal.4th 195, 266.)

[5] The instruction stated: "The word[] 'notify' and the phrase, 'everything in his power,' should be understood in their common, everyday sense. 'Notify' means to communicate or make known. [¶] 'Everything in his power' means to take some action that he is physically capable of taking. [¶] In the context of, 'withdrawal from participation of [*sic*] a crime,' those words mean that a defendant's failure to continue previously active participation in the crime planned is not enough to constitute withdrawal. [¶] There must be an affirmative and good faith rejection or repudiation of the plan communicated to the

The jury had deliberated for over eight hours up to that point. Soon after receiving the clarifying instruction, it returned its verdict.

Analysis

"The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." (Evid. Code, § 502.) A

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defendant's accomplices. [¶] In addition, the defendant must perform whatever action is available under the circumstances to prevent commission of the planned crime. [¶] Stated another way, the responsibility of a defendant who has knowingly and intentionally aided and abetted the commission of a crime does not cease unless, within time to prevent commission of the planned crime, he has done everything feasible to prevent its completion. [¶] If he changes his mind, he must do everything possible to prevent the crime from being committed. It is not enough that he may have changed his mind and tries, when too late, to avoid responsibility. [¶] He will be liable if he fails, within time, to let his accomplice know of his withdrawal and does not do everything in his power to prevent commission of the crime." Defense counsel objected to this instruction. Counsel argued that the phrase "physically capable of doing," standing alone, misstates the test because it does not limit "physically capable" to that "which is feasible under the circumstances[.]" Counsel asserted further that the remainder of the court's instruction set the bar too high for one withdrawing as an aider and abettor, as distinct from one withdrawing from a conspiracy.

Defendant renews this objection as a separate claim of error. (See part II of the Discussion.)

trial court has a sua sponte duty under Evidence Code section 502 to instruct the jury correctly on defendant's burden of proof as to a defense. (*People v. Mower* (2002) 28 Cal.4th 457, 483-487.)

However, the trial court is required to instruct on a defense (and, by extension, on the defendant's burden of proof as to that defense) only if substantial evidence supports the defense. (See *People v. Panah* (2005) 35 Cal.4th 395, 484; *People v. Flannel* (1979) 25 Cal.3d 668, 684-685 [limited on unrelated grounds by statute as described in *In re Christian S.* (1994) 7 Cal.4th 768, 777-778]; *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1243; *People v. Miceli* (2002) 104 Cal.App.4th 256, 267.) Substantial evidence is "evidence which is reasonable, credible, and of solid value[.]" (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Horning* (2004) 34 Cal.4th 871, 901.) On review, we determine independently whether substantial evidence to support a defense existed. (See *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1270; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [maj. opn. of Woods, J.], 824-825 [conc. opn. of Johnson, J.].)

To be entitled to an instruction on the withdrawal defense, a defendant charged with aiding and abetting a crime must produce substantial evidence showing that (1) he notified the other principals known to him of his intention to withdraw from the commission of the intended crime or crimes, and (2) he did everything in his power to prevent the crime or crimes from

being committed. (See *People v. Ross* (1979) 92 Cal.App.3d 391, 405; *People v. Norton* (1958) 161 Cal.App.2d 399, 403.) As noted, the trial court so instructed the jury.

We conclude defendant was not entitled to an instruction on this defense because substantial evidence did not support it. According to the evidence most favorable to defendant, his last interview with the police, he neither communicated to codefendants that he was withdrawing from participation in the crime nor did anything to prevent it: he merely hung back while they went into the apartment, waited until they reemerged, and fled along with them. Although trial counsel argued that defendant's failure to go in with the others communicated his intent to withdraw, the jury heard no objective evidence that they so understood his conduct. And there is no evidence whatever that he tried to prevent the crimes from occurring.

Defendant asserts he "held back while Craver and Jones conspired." So far as this assertion is meant to support defendant's theory of withdrawal, it fails to do so because we cannot find any evidence in the record that codefendants "conspired" at the crime scene. On the contrary, defendant told the detective that the principals "really didn't talk about it. We just went in there without a plan or nothing."

Defendant asserts he told the police "he thought Jones and Craver knew he had gotten cold feet and was backing out." But what defendant claims to have "thought" is irrelevant. The withdrawal test is objective. Its first prong is the actual

communication of one's intent to withdraw. If defendant did not tell Jones and Craver that he was backing out, we do not see how they could have known it. Even if they noticed (despite the darkness inside the apartment, the immediate struggle, and the speed at which events moved) that he had not gone into the apartment along with them, they might still have thought he would come in after them.

But even if defendant's failure to go into the apartment could have been deemed substantial evidence that he communicated his intent to withdraw, defendant points to no evidence that he did anything to prevent the crimes from occurring. For this reason alone, he was not entitled to an instruction on withdrawal.

Defendant renews his argument at trial that he should not have to show any effort to prevent the crimes from occurring because he actually and reasonably feared for his life at the hands of codefendant Craver if he had done anything more than he did while the crimes were in progress. He asserts, in other words, that we must assess this issue by engrafting the notion of duress onto the withdrawal defense. Although defendant does not cite any California authority on point for this proposition, we shall assume for the sake of argument that a withdrawal defense may be available to a defendant who does not attempt to stop an ongoing crime in which he initially agreed to participate because he reasonably fears that any such attempt would endanger his life at the hands of a coprincipal.

Nevertheless, the facts do not support defendant's claim that he was entitled to that defense.

Under California law, duress is a defense to any non-capital crime where the defendant acted "under threats or menaces sufficient to show that [he] had reasonable cause to and did believe [his] li[fe] would be endangered if [he] refused." (§ 26, subd. Six.) We see no rationale for applying any other definition of duress here. Therefore we must determine whether a reasonable person in defendant's position would have believed his life would be endangered if he refused to continue his participation in the crimes or if he attempted to prevent their commission, and whether defendant actually so believed. We conclude that defendant cannot meet either of these tests.

Relying on his last statement to the police, defendant claims that he was "intimidated" by Craver on the evening of the crime because Craver brought a duffel bag containing weapons and a "death manual" about ways to hurt people, and also photographs of himself in prison; defendant wanted him to leave. However, defendant did not say he was intimidated by Craver (using that word or any other). Indeed, defendant said he did not know why Craver was showing him the items in the duffel bag. The photographs appear to have been of Craver's family, not of

Craver in prison.[6] And although defendant did say he wanted Craver to leave, he did not say that it was out of fear.

Defendant asserts that when Craver returned later in the evening after having outlined the proposed robbery to him, he did not initially open the door and waited a long time before doing so. Again, however, he did not say that this was out of fear.

Defendant asserts he "became even more wary and reluctant when he realized the enterprise was becoming more serious after Craver revealed the involvement of a third person." However, in the passages defendant cites, he merely described the unfolding events. He never said at that point in the interview that he was becoming fearful or uneasy.

Defendant asserts he told the police "he had decided to back out on the way to the apartment and he became increasingly fearful when he trailed Jones and Craver as they walked to the apartment and entered it." So far as defendant means that he was fearful *of Craver*, the record does not support him. He said that at the point when they got to the complex he was "watching

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[6] Defendant said: "He brought over nunchakas [*sic*]. He had knives. That fucker is crazy, man." However, the context does not show that this meant defendant was claiming to be intimidated by him. Defendant also said ambiguously: "I looked through his pictures, you know what I'm saying, his family and all that, him being in the pen and all that." But later on he agreed with the detective that the pictures were of Craver's family.

out for [him]self," then, "I guess they kind of knew I was like scared. I don't know. I guess they really wasn't -- shit, [Craver] wasn't worried about it. (Unintelligible) afraid to go inside." When the detective asked: "You're in a place you really didn't want to be, weren't you? [¶] . . . [¶] Kind of got yourself in over your head. Is that right?" defendant said, "Yeah." In short, what defendant claimed to fear was not his coparticipants but following through with the crime itself.

Similarly, as noted above, defendant told the police "he thought Jones and Craver knew he had gotten cold feet and was backing out." This statement reinforces the point we have just made. If defendant, believing Craver "knew" that, did not go ahead to assist in committing the crime, it follows that he was more afraid of going through with his part in the crime than of any retaliation from Craver for withdrawing from it. It is illogical on these facts to assert that fear of Craver prevented defendant from taking all the steps required by the withdrawal defense.

Just as there is no substantial evidence defendant actually believed his life would be in danger from Craver if he withdrew from participation in the crime, there is no substantial evidence that a reasonable person in defendant's position would have held that belief. Defendant fails to cite any evidence that Craver actually threatened or menaced him at any time before the crimes were committed. Thus, nothing in the record excuses defendant's failure to try to prevent the commission of

the crime even on the theory that duress can form part of a withdrawal defense.

Finally, defendant contends he was entitled to an instruction on the defense, even if substantial evidence did not support it, because he was relying on the defense. He cites the disjunctive test set out in *Sedeno, supra,* 10 Cal.3d 703 (disapproved on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149 & 178, fn. 26), which we have mentioned: "[T]he duty to give instructions . . . on particular defenses and their relevance to the charged offense arises only if it appears that the defendant is relying on such a defense, *or* if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*Sedeno, supra*, 10 Cal.3d at p. 716, italics added; accord, *People v. Breverman, supra,* 19 Cal.4th at p. 157.) However, neither in *Sedeno* nor in any later case has the high court used the first prong of the *Sedeno* test to require instruction on a defense for which there was no substantial evidence. (Cf. *People v. San Nicolas, supra*, 34 Cal.4th at p. 669; *People v. Maury* (2003) 30 Cal.4th 342, 424; *People v. Michaels* (2002) 28 Cal.4th 486, 529; *People v. Barton* (1995) 12 Cal.4th 186, 194-195; *People v. Johnson* (1993) 6 Cal.4th 1, 43-45; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1026 [citing test erroneously as conjunctive]; *People v. Wickersham* (1982) 32 Cal.3d 307, 329 [disapproved on another point in *People v. Barton, supra*, 12 Cal.4th at p. 201].)

Moreover, our Supreme Court has disapproved *Sedeno* to the extent it suggested a duty to instruct "whenever any evidence is presented, no matter how weak." (*People v. Flood* (1998) 18 Cal.4th 470, 480; *People v. Flannel, supra,* 25 Cal.3d at p. 684, fn. 12.) Accordingly, most recent decisions of our Supreme Court have not mentioned the first prong of the *Sedeno* test and have said, "A trial court is required to give a requested instruction on a defense only if substantial evidence supports the defense. [Citations.]" (*People v. Panah, supra,* 35 Cal.4th at p. 484; *In re Christian S., supra,* 7 Cal.4th at p. 783, but see *People v. San Nicholas* (2004) 34 Cal.4th 614, 669.)

We conclude that these recent decisions, including *People v. Flood, supra,* 18 Cal.4th at page 480, have overruled the first prong of the *Sedeno* test. "It is an established rule of law that a later decision overrules prior decisions which conflict with it, whether such prior decisions are mentioned and commented upon or not." (*In re Lane* (1962) 58 Cal.2d 99, 105.)

Furthermore, we have no hesitation in departing from the first prong of the *Sedeno* test, which has been overruled in later cases, because it is illogical. The Legislature or the courts create defenses in order to specify circumstances or states of mind that excuse conduct that is otherwise criminal. But the People, as well as defendant, have the right to an accurate enforcement and interpretation of the law. (See *People v. Birks* (1998) 19 Cal.4th 108, 127-128; *People v. Barton, supra*, 12 Cal.4th at p. 533.) It defeats the policy judgments

of the courts and the Legislature to allow a defendant to receive an instruction on a defense, and to allow a jury to excuse criminal conduct, when the defendant purports to rely on a defense for which substantial evidence does not exist. Dangerous persons could go free. Moreover, such an instruction will often confuse a jury because the jury will probably wonder why it has received an instruction on a defense for which there is no substantial evidence. For all these reasons, absent substantial evidence to support his withdrawal defense, defendant was not entitled to instruction on that defense merely because he purported to rely on it.

We have no doubt that a defendant's story (his version of the events in question) constitutes substantial evidence, in and of itself, even if the story is implausible and seriously contradicted by other evidence. However, as we have explained, defendant did not testify, and his pretrial statements did not make out the essential elements of a withdrawal defense.

Because defendant was not entitled to an instruction on a withdrawal defense, any error in the trial court's failure to instruct on defendant's burden of proof on that defense is necessarily harmless by any standard.

II

Defendant contends the instruction the trial court gave on the withdrawal defense, and in particular the court's clarification in response to the jury's question during deliberation, was prejudicially erroneous. Because defendant

was not entitled to such instruction, any error in the legal definition of the defense was necessarily harmless.

III

Defendant contends he suffered prejudice because the trial court, over objection, granted the prosecution's pretrial request for separate juries as to all defendants. According to defendant, this ruling prevented defendant's jury from hearing a statement given to the police by codefendant Jones that tended to exculpate defendant and that would have been admissible if defendant and Jones had been tried before a single jury, as their trial counsel requested. We conclude the trial court properly exercised its discretion based on the facts before the court when it ruled.

Background

The prosecutor originally charged defendant and Craver together, and a preliminary hearing was held for both in December 2001. In March 2003, the prosecutor moved to join Jones. The trial court granted the prosecutor's motion to consolidate the cases.

On July 16, 2003, the prosecutor told the trial court that he had agreed to proceed with two juries, one for defendant and Jones and another for Craver, based on the desire of defendant's and Jones's counsel to try their clients' cases together. The prosecutor stated: "Otherwise, I would need three juries because there is certain evidence that would not be admissible against each defendant; but they are, apparently, willing to

waive that." Defendant's counsel explained that he wanted to consolidate juries with Jones because the prosecutor had indicated that he intended to introduce defendant's Mirandized statements.

On July 21, 2003, the prosecutor told the trial court his position had changed. He asked for three separate juries, for two reasons: (1) he did not know what the witnesses might say that could be objectionable either to defendant or to Jones, and (2) he did not know whether he would introduce all of defendant's statements to the police or all except the last one, and he did not want to commit himself before trial on this point at the risk of having to renege on his commitment as the evidence developed.

Defendant's counsel confirmed that he wanted a joint jury with Jones only if the prosecutor used defendant's statements. "The bottom line is this: If the prosecutor plays any statement -- I don't care which, how many or whatever -- where my client confesses to being there, then I am not prejudiced by the introduction of Jones or Craver's statements at all . . . . [¶] The danger is, if I say we will do dual juries and we hear [defendant Jones's] confession implicating my guy and [the prosecutor] says, 'I changed my mind. I am not introducing a single admission against your guy,' then I am stuck." Counsel added that he could not make an intelligent decision whether to

waive any *Aranda/Bruton*[7] objection on his client's behalf until he had notice what evidence the prosecutor intended to offer.

The trial court finally ruled that the case would be conducted with three juries, reasoning that "these are Sixth Amendment rights of the defendants."[8]

At trial, after the People rested, Jones's counsel called him to the witness stand. Jones exercised his Fifth Amendment privilege not to testify. All three juries were excused from the courtroom. Out of the juries' presence, Jones's counsel stated he had been unaware his client was not going to testify.

After his conviction, defendant moved for new trial, partly on the ground that the trial court's granting of separate juries for all defendants had prevented defendant's jury from hearing codefendant Jones's statement to the police, which was presented

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[7] See *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476] (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) [abrogated in part by Proposition 8, as explained in *People v. Fletcher* (1996) 13 Cal.4th 451, 465].

[8] The prosecutor represented to the trial court that defendant and Jones incriminated Craver in their statements. Craver's counsel agreed and said he would raise an *Aranda* objection to the admission of their statements against his client. Jones's counsel summarized what his client had told the police: "With respect to Shelmire, he says that he was there outside the window and never went in, puts him there. He is also one of the threesome who walks up to the apartment; but he clearly implicates Craver as the shooter, that he is in the thing and he is the shooter."

only to Jones's jury, and which tended to exculpate defendant.[9] (We consider another ground for defendant's motion in part VI of the Discussion below.) The trial court denied the motion as to that ground.

Analysis

Although the Legislature has stated a preference for joint trial of codefendants charged with the same offense, the trial court in its discretion may grant separate trials. (§ 1098; *People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) "The use of dual juries is a permissible means to avoid the necessity for complete severance. The procedure facilitates the Legislature's statutorily established preference for joint trial of defendants and offers an alternative to severance when evidence to be offered is not admissible against all defendants. [Citations.] Whether the court abused its discretion by denying complete severance and impaneling separate juries is decided on the basis of the facts known at the time of the ruling on the severance motion." (*People v. Cummings, supra*, 4 Cal.4th at p. 1287.)

Defendant contends the trial court should have denied the prosecutor's request for three separate juries. He claims the court erred prejudicially because (1) he and codefendant Jones never waived their right to joint trial as to themselves, and

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[9] During his interview with the police, Jones said defendant "didn't do anything" and agreed with Detective Bayles's statement that defendant had "chickened out."

(2) defendant's jury never heard Jones's statement to the police, which would have tended to exculpate defendant. We are not persuaded.

Assuming for the sake of argument that defendant and Jones had a "right" to a joint trial, the fact that defendant and Jones did not waive their right to joint trial as to themselves is not dispositive. The trial court had the discretion to grant the prosecutor's request for separate juries based on the parties' representations that *Aranda/Bruton* problems would arise in a joint trial (not to mention the game-playing of all counsel with respect to the defendants' prior statements). (*People v. Cummings, supra*, 4 Cal.4th at p. 1286.) So far as defendant contends it is improper for the prosecution to request separate juries or for the trial court to overrule defendants' objection to such request, defendant does not cite any authority in his support and we know of none that would support him.

As for defendant's second point, when the court made its ruling it did not have before it the statement by Jones on which defendant now relies. It had only the summary offered by Jones's counsel, which was not exculpatory for defendant: according to counsel, the statement placed defendant at the scene as a coprincipal even if he did not go inside the apartment. The trial court did not abuse its discretion by denying defendants' request for a single jury as to them based on that representation by Jones's counsel.

So far as defendant argues that Jones's surprise refusal to testify caused defendant prejudice because his jury never got to hear Jones's allegedly exculpatory pretrial statement, the argument fails at the threshold because the trial court could not have anticipated that turn of events when it ruled on the prosecutor's request for separate juries.

Defendant has failed to show that the trial court's ruling was an abuse of discretion.

IV

Defendant contends the trial court prejudicially abused its discretion by denying his motion for mistrial after a testifying police officer improperly disclosed defendant's parole status. We conclude the trial court's actions sufficiently cured the harm from the improper testimony.

Background

Defendant moved in limine to exclude any reference to his 1996 juvenile adjudication for robbery, his subsequent five-year placement in the California Youth Authority, and the revocation of his parole in January 2001 (less than a year before the charged crime). The prosecutor wanted to be able to use the juvenile adjudication to impeach defendant should he testify. The trial court stated it would rule on the issue if counsel could not agree on how the evidence could be used for impeachment. However, it does not appear from the record that the court ever made a ruling.

During the prosecution's case-in-chief, Detective Bayles testified on direct examination about his interview with defendant's girlfriend Kimberly Domondon (evidently to impeach her prior testimony that she could not recall what she said to him).

Codefendant Craver's counsel began cross-examination by asking about the time at which Bayles interviewed Domondon. After eliciting that the interview occurred on the afternoon of September 14, 2001, counsel followed up (italics added):

"Q So that was hours after [defendant] Shelmire had been arrested? Correct?

"A Detained, yes. That would be correct.

"Q *He was in custody? He was under arrest at that time, wasn't he?*

"A *I believe he was in custody for his parole violation at that time. Yes*.

"[Defendant's counsel]: I object and move to strike that.

"THE COURT: That's stricken. The jury shall not consider that information for any purpose whatsoever."

Outside the juries' presence, defendant's counsel moved for a mistrial. The trial court deferred ruling on the motion, stating that what had occurred was "regrettable" and both Bayles's answer and the question that induced it were unnecessary, but no one had acted in bad faith. The prosecutor stated that he had not warned Bayles to avoid mentioning defendant's parole status because he knew his own questioning

would not raise the subject and he did not know why Craver's counsel would have explored that area. The court noted that Craver's counsel probably had not expected the answer he got.

Subsequently, the trial court denied the mistrial motion, ruling that the court's immediate response to the "inadvertent" reference to defendant's parole status (striking the testimony and admonishing the jury to disregard it) was sufficient to protect defendant.

Analysis

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial. [Citation.]" (*People v. Silva* (2001) 25 Cal.4th 345, 372.) Although "exposing a jury to a defendant's prior criminality" may prejudice the defendant, it remains in the trial court's discretion whether striking the improper testimony and admonishing the jury to disregard it will cure the harm. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581.) The jury is presumed to follow the trial court's admonition to disregard improper evidence, particularly absent bad faith; only in the exceptional case will this presumption not apply. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404; *People v. Allen* (1978) 77 Cal.App.3d 924, 934-935.) Where the evidence of defendant's guilt is overwhelming and undisputed, or where it is not reasonably probable defendant would obtain a more favorable

result had the improper remark not been made, we will not find an abuse of discretion or resulting prejudice from a trial court's denial of a motion for mistrial. (*People v. Harris, supra*, 22 Cal.App.4th at p. 1581.)

Defendant asserts that this is the exceptional case where the presumption that the jury will heed the trial court's admonition does not apply. We disagree.

First, contrary to defendant's position, the evidence of his guilt as an aider and abettor was overwhelming. His participation in codefendants' original decision to commit a crime and his presence at the crime scene were undisputed, and the only defense he raised (withdrawal) was unsupported by substantial evidence, as shown in part I of this Discussion. Thus, it is not reasonably probable he would obtain a more favorable result on retrial under proper instructions, which did not include the undeserved instruction on withdrawal that defendant actually received.

Second, defendant's parole violation, though evidence of prior criminality, was a peripheral point. In light of defendant's admission that he knowingly joined codefendants in a criminal scheme, his parole status paled into insignificance.

People v. Ozuna (1963) 213 Cal.App.2d 338, on which defendant relies, is readily distinguishable. There, in a murder case with no eyewitnesses where the defendant had previously obtained a mistrial, the prosecutor intentionally elicited testimony not presented in the first trial that

defendant was an "ex-convict." Under all the circumstances, the appellate court found the trial court's striking of the testimony and admonishing the jury insufficient to cure the harm. (*Id.* at pp. 339-342.) Here, we have ample eyewitness testimony plus defendant's own admissions, and the prosecutor did not elicit the improper evidence.

People v. Allen, supra, 77 Cal.App.3d 924, also cited by defendant, is no more helpful to him. There, the crime was a robbery with two participants, one a minor. The victims identified only the minor. Defendant testified, claiming mistaken identity and alibi; other witnesses corroborated the alibi. Against this evidence, the prosecution presented the accusations of jailhouse informants plus the minor and his mother, who testified improperly that defendant was "on parole." (*Id.* at pp. 928-935.) The appellate court found the case "extremely close" and dependent on the witnesses' credibility; therefore it deemed the trial court's order to strike the improper testimony and admonition of the jury insufficient to cure the harm. (*Id.* at pp. 934-935.) Here, by contrast, defendant admitted his initial participation in the crime, and absent the unwarranted instruction on withdrawal this was not a close case. (So far as defendant contends otherwise, pointing to the jury's questions about the defense during deliberations and the time it took to deliberate in defendant's case before those questions were answered, this merely underscores the problem of instructing on withdrawal in the first place.)

Finally, defendant cites *People v. Figueiredo* (1955) 130 Cal.App.2d 498, in which the appellate court reversed after improper testimony was admitted that the defendant had served time in San Quentin. However, in that case the prosecutor first obtained defendant's admission to prior convictions and prison terms by promising that the admission would keep defendant's history from the jury, then deliberately elicited the improper testimony about his prior prison term. (*Id.* at pp. 499, 502, 505-506.) Nothing of the kind happened here.

Defendant has failed to show that the trial court's response to the improper testimony was insufficient to cure any harm it might have caused.

V

Defendant contends the trial court erred prejudicially by denying the jury's request for a readback of trial counsel's argument on the withdrawal defense. (See part I of the Discussion.) Because defendant was not entitled to this defense, any error in this respect was necessarily harmless.

VI

Defendant contends the trial court abused its discretion by rejecting his claim on motion for new trial that he would have testified but for a death threat during trial by codefendant Craver. We find no abuse of discretion.

Background

Defendant's new trial motion asserted that he had refused to testify, against his attorney's advice and his own

inclinations, because codefendant Craver had threatened him with death if he did so; thus, Craver's conduct had denied defendant his right to testify. If he had testified, he would have discussed his abandonment and withdrawal from the criminal enterprise. Given the jury's obvious difficulty over this issue, defendant had suffered prejudice from his inability to testify.

To support this contention, defendant offered his own declaration, that of his trial counsel, Pete Harned, and that of Craver's cocounsel, Lisa Franco.

Defendant declared that on August 10, 2003, the day before he was scheduled to testify, Harned told him that Craver had threatened his life and had sent a letter to Craver's friends in prison to have defendant killed on arrival. Taking this threat seriously, defendant decided not to testify. Harned told him to think it over that night. The next day, defendant stuck to his decision and declined to testify. However, if defendant had a new trial in which he could be physically separated from Craver, he would feel secure enough to testify.

Harned declared that he had consistently advised defendant to testify because otherwise Harned would have little material with which to argue withdrawal to the jury. Harned had known from his initial involvement in the case in October 2001, and had advised defendant, that an informant had said Craver would kill defendant if he testified; defendant was placed in protective custody, and the Sheriff's Department had always

tried to bring defendant and Craver to court separately for pretrial court appearances. However, defendant did not take the alleged threat seriously because Craver had acted friendly during the trial. But on August 8, 2003, Lisa Franco, Craver's cocounsel, advised Harned that Craver had told her defendant would be killed if he testified and that Craver had already sent a letter to that effect to his "people in prison." Harned immediately contacted the deputy district attorney trying the case and the detective assigned to the case, to whom Harned relayed the information. The detective promised to notify security at the jail and at court transport immediately. Also on August 8, 2003, Harned met with the court privately in chambers and relayed the substance of Franco's information. On August 10, 2003, Harned met with defendant and conveyed the same information to him, advising him that the likely consequence of his failure to testify would be a guilty verdict. On August 11, 2003, rather than testify as scheduled, defendant refused.

Franco declared that Craver had conveyed his threat to her on August 8, 2003. Believing the danger to defendant to be "imminent and serious," she disclosed the threat to Harned the same day.

The prosecutor did not file written opposition to defendant's motion. At the hearing on the motion, however, the prosecutor argued: (1) The declarations were hearsay. (2) By defendant's own admission, the alleged threat of August 8, 2003, was not new; Harned and defendant had known of such a threat

since October 2001. (3) Defendant did not request severance when the matter came up during trial, and nothing had happened as a result of counsel's conference with the trial court. (4) Defendant had not cited any law to support his claim that this incident entitled him to a new trial.

The trial court denied defendant's new trial motion as to this ground, reasoning as follows:

"Well, I'm going to assume for purposes of the judgment and sentence the truth of the statements in the declarations provided by [defendant] and Mr. Harned and attorney Franco.

"And I'm . . . going to deny the motion for new trial based on that ground[]. So we're not going to get to the point where you will need to cross[-]examine the declarants, Mr. Greene [the prosecutor].

"It's obvious to the court that [defendant] made the decision not to testify, fully realizing the possible consequences. And it's also obvious as Mr. Harned concedes that law enforcement did nothing wrong to bring about this situation.

"And just as was the case with Mr. Harned the court cannot find any legal support for ordering a new trial in this circumstance.

"And . . . I also observe that there is a substantial public policy interest in not setting a precedent. It would be very difficult to ascertain when such requests are genuine and based on substantial credible information and when they are not as is often the case where co-defendants develop a hostile

relationship and present as . . . being afraid, one of . . . the other. It's an -- it would be a Pandora's box.

"[Defendant]'s best option was to testify and trust the authorities to preserve his safety. That was his choice.

"Furthermore I cannot say that had [defendant] testified as he indicated . . . that the verdict would have been any different.

"So I deny the motion on that ground."

Analysis

We review an order denying a new trial for abuse of discretion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) Like the trial court, we presume defendant's declarations true for the purpose of reviewing the court's ruling.

Defendant asserts, as below, that Craver's threat deprived him of his right to testify. But defendant cites no authority on point in support of this proposition, and we know of none that could support it. As the trial court found, defendant made his own decision, rejecting his counsel's advice to testify despite the threat. Counsel was presumably aware of the measures that had already been taken or could be taken to protect defendant and considered them sufficient. If defendant chose not to take advantage of them, after being advised that the likely result of his choice was conviction, he must bear the consequences.

So far as defendant claims his decision not to testify was involuntary due to duress, we agree with the trial court that

the claim is not cognizable as grounds for a new trial. Cases with multiple defendants reach the courts every day, and many of those defendants are convicted after declining to testify. If every such defendant could demand a new trial based on an alleged threat from a codefendant, mini-trials of all such claims would inevitably ensue, and the reliability of the verdicts in all such cases would be undermined.[10]

Finally, we also agree with the trial court that defendant would not have had a reasonable probability of obtaining a better result had he testified. As we have explained, his only defense was unsupported by the accounts he gave the police. If he had testified to anything more or different, he would have been impeachable for fabrication. Thus, there is no reason to think he would have fared better had the trial court granted his motion for new trial.

VII

Finally, defendant contends that he suffered cumulative prejudice from the totality of the errors in the case. As we

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[10] Defendant asserts that this consideration does not apply here because the trial court assumed the truth of defendant's declarations. However, the prosecutor had already pointed out that they were hearsay and demanded the opportunity to cross-examine the declarants. The court may have taken the declarations as true simply to avoid a mini-trial on allegations that were legally insufficient to require a new trial in any event.

have found no error that could have prejudiced defendant, we find no cumulative prejudice.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

DAVIS, J.

RAYE, J.